INDEX

	Page
QUESTION PRESENTED	2
STATEMENT	2
ARGUMENT	10
CONCLUSION	15

CITATIONS

CASES:

A. T. & S. F. Ry. Co. v. United States, 218 F. Supp. 359 (1963) 13
Ayrshire Collieries Corp. v. United States, 335 U.S. 573 ..... 10, 13
Baltimore & O. R. Co. v. United States, 345 U.S. 146 ..... 8, 11
Consolidated Southwestern Cases, 205 I.C.C. 601 (1934) 3
Cudahy Packing Co. v. Akron, C. & Y. R. Co., 318 I.C.C. 229 13
Eastern Class Rate Investigation, 164 I.C.C. 314 (1930) 3, 5
H. McMorran and E. R. Harrington v. G. T. R. Co. Can., 3 I.C.C. 252 (1889) 13
Illinois Commerce Commission v. United States, 292 U.S. 474 ..... 10, 13
National Water Carriers Assn. v. Long Island R. Co., 287 I.C.C. 726 14
New York v. United States, 331 U.S. 284 ..... 8, 11
Norcross Bros. v. Pennsylvania R. Co., 210 I.C.C. 629; 220 I.C.C. 407 14
Petroleum and Petroleum Products, 245 I.C.C. 33 14
Port of New York Authority and City of New York v. Aberdeen & Rockfish R. Co., et al., 321 I.C.C. 738 2
Virginian R. Co. v. United States, 272 U.S. 658 ..... 11, 13
Western Trunk-Line Rate Investigation, 164 I.C.C. 1 (1930) 3

STATUTE:

Interstate Commerce Act, 49 U.S.C. 1, et seq.:
Section 1 ..... 4, 9, 11
Section 3 ..... 4, 9, 11, 12, 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 556

THE PENNSYLVANIA RAILROAD CO., ET AL., *Appellants*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*

On Appeal from the United States District Court for the Eastern District of Pennsylvania

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MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, The Port of New York Authority and The City of New York, complainants before the Interstate Commerce Commission and intervening defendants in the District Court, move that the judgment of the District Court be affirmed.

QUESTION PRESENTED

On hauls ranging up to 2,035 miles—and generally exceeding 1,000 miles—on carloads of fruits and vegetables from the South and Southwest, did the Interstate Commerce Commission (upon complaint and following hearings) act lawfully in requiring the railroads to maintain uniform line-haul rates to all stations within the long-established New York terminal rate group; the Commission expressly leaving the railroads free—

(a) to increase the general level of their rates and charges;

(b) to choose such level as they preferred for the uniform rates; and

(c) to assess special additional charges for any accessorial services and facilities provided.

STATEMENT

This is a direct appeal from a judgment (J.S. 57a) of a three-judge district court dismissing appellants' suit to set aside an order of the Interstate Commerce Commission entered in *Port of New York Authority and City of New York* v. *Aberdeen & Rockfish R. Co., et al.* (321 I.C.C. 738) (J.S. 30a). The order of the Commission is found at page 52a of the Jurisdictional Statement. The opinion of the district court begins at page 1a thereof.

Appellees are the Pennsylvania Railroad Company and ten other northern railroads. Two northern railroads, New York Central Railroad Company and Erie-Lackawanna Railroad Company, favor uniform rates to all stations in the New York terminal rate group.

They took this position in the Commission proceeding and intervened in the court proceeding herein in support of the Commission's order. The complaint of The Port of New York Authority and City of New York named as defendants 396 railroads participating in tariffs providing rates for the transportation of carloads of fruits and vegetables from the South and Southwest to the New York terminal rate group, i.e., the urbanized New York metropolitan area. The southern and western railroads did not defend the rates complained of and took no part in the Commission or court proceedings.

A fundamental and universal feature of the railroad freight rate structure in the United States, a feature which has existed practically since the beginning of railroad transportation, is the maintenance of terminal rate groups, that is, on long-haul traffic the application of uniform rates to and from all stations in the same town, city or urbanized metropolitan area. The New York terminal rate group, embracing all railroad stations in both New York and New Jersey in the New York metropolitan area, has existed for over a century and has been repeatedly approved and its maintenance required by the Commission. (321 I.C.C., at pages 746-748; J.S. 41a-43a) The splitting of a terminal rate group is a violation of first principles. No terminal rate groups—

> "should be so delimited as to separate stations constituting a single industrial or commercial community." *Consolidated Southwestern Cases,* 205 I.C.C. 601, 637 (1934); *Eastern Class Rate Investigation,* 164 I.C.C. 314, 415 (1930); *Western Trunk-Line Class Rate Investigation,* 164 I.C.C. 1, 197 (1930)

The urbanized New York and New Jersey area making up the New York metropolitan area has been repeatedly found by the Commission to "constitute a single community." (321 I.C.C. at pages 747-748; J.S. 42a-43a)

In the present case, as in earlier cases, the Commission found: "Both the commerce of the country and the general public interest require the continued maintenance of such terminal groups as the New York, Hampton Roads, San Francisco, Chicago, and St. Louis groups." (321 I.C.C. at pages 748, 749; J.S. 44a, 45a)

The complaint of the Port Authority and City of New York here involved assailed as unlawful the rates on fruits and vegetables to the New York metropolitan area from the South and Southwest, charging that the rates were unjust and unreasonable in violation of Section 1 and unduly prejudicial and preferential in violation of Section 3 of the Interstate Commerce Act. The gravamen of the complaint was that to stations in the New York metropolitan area located in New York City defendants were maintaining higher rates than they applied on the same traffic when delivered to stations in the same metropolitan area located in New Jersey. Illustrative of the rates assailed were the recently established per-car rates from Florida on vegetables, and mixed cars of fruits and vegetables. Representative rates were $400.00 per car to stations in New Jersey and $457.00 to stations in New York City. A haul of 1,271 miles from Florida to New York is involved in transporting the traffic under these representatives rates. (J.S. 26a)

All cities and metropolitan areas contain numerous railroad freight stations. For example, the Phila-

delphia terminal rate group "includes 100 freight stations, in addition to lighterage points, separated from each other in some instance by as much as 26 miles." *Eastern Class Rate Investigation,* 164 I.C.C. 314, at page 447. The New York terminal rate group contains 125 stations of which 25 stations are located in New York City and 100 stations in New Jersey. (321 I.C.C. at page 739; J.S. 31a)*

In transporting the fruit and vegetable traffic from the South and Southwest to the New York terminal rate group, the hauls from the Southwest range up to 2,035 miles (J.S. 29a) and from the South they generally exceed 1,000 miles and range up to 1,308 miles. (J.S. 26a, 27a, 28a) It is thus obvious that on shipments to the New York terminal rate group all but a minuscule fraction of the transportation is *identical* whether the car is delivered to one or another of the stations in the terminal rate group. The Commission, upon analysis of defendants' cost evidence, found a relevant difference of $14.14 per car in the "terminal" cost of delivery at representative New Jersey stations and at the Pennsylvania Produce Terminal station on Manhattan (Piers 27-28-29). (J.S. 36a, 37a) This

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* The record before the Commission contains detailed testimony and detailed maps showing railroad lines and terminal facilities in, and the size and topography of the area embraced in, the terminal rate groups at the following major cities: San Francisco, Philadelphia, Baltimore, Norfolk-Newport News, Cincinnati, Louisville, St. Louis, Boston, and Chicago, as well as New York. (Tr. 101-143; Exs. Nos. 26 through 48) This evidence shows that the New York terminal rate group cannot be distinguished topographically, or as to size, or from the standpoint of railroad transportation, or otherwise, from the other major terminal rate groups in the country.

was the only station in New York City for which the railroads supplied cost figures. The Commission found:

> "On this record we do not regard the $14.14 per-car difference in terminal costs as controlling. Cost differences of that degree may be found to exist as between stations in any large rate group." (321 I.C.C. at pages 744-745; J.S. 38a)

The Commission further observed that variations in rates to a given terminal rate group reflecting such variations in cost would produce "a choatic rate situation," "the result could only be confusion and an impractical and unworkable rate structure;" and that if such variations in costs were to be reflected in the rates—

> "the entire rate structure of the country would have to be remade." (321 I.C.C. at page 748; J.S. 43a)

It was pointed out by the Commission that under defendants' theory they could publish "125 different rates on each of the four major movements" to the one terminal rate group. This the Commission regarded as ridiculous in the extreme and as plainly demonstrating the unsoundness of the railroads' position. (321 I.C.C. at pages 749-750; J.S. 45a)

The higher rates complained of applied to all 25 stations in New York City; but defendant railroads restricted their cost evidence to operations in serving only one of these stations, namely, the Pennsylvania Produce Terminal (Piers 27-28-29). The Commission found, and the defendant railroads in their testimony had emphasized, that the Produce Terminal is "actually a market place for the produce industry" and that the facilities and services provided by the railroads at this

station "greatly exceed those provided at an ordinary freight station." (321 I.C.C., at page 740; J.S. 33a) The terminal is cooled in warm weather and heated in winter; auction rooms are provided; and "Floor space is assigned for each car and the contents thereof are sorted and displayed for prospective buyers." (*ibid.*)

The Commission found that the greater part of the "station" costs shown for this one station were "extraordinary" and related to accessorial rather than normal transportation services. (321 I.C.C. at page 745; J.S. 38a) It therefore concluded:

> "Furthermore, the cost of providing extraordinary services and facilities at one New York station (Piers 27-28-29) affords no justification for the imposition of higher rates and charges at other New York stations where no such pier services are performed."

The traffic importance of the 24 stations in New York City other than the Pennsylvania Produce Terminal is shown by the Commission's finding that "1,100 cars of vegetables subject to the $57 per-car [higher] charge were delivered at stations east of the Hudson River other than the piers" whereas 542 such cars were delivered at the piers. (321 I.C.C. at page 741; J.S. 34a) "However, twice as many carloads of vegetables were delivered to New York stations other than piers 27, 28 and 29, on which differentially higher rates also applied." (318 I.C.C. at page 472; J.S. 14a)

The 8,000,000 people living in the City of New York consume a large volume of fresh fruits and vegetables, the total from all origins amounting in the aggregate to an annual volume equal to "a train more than 1,500 miles in length." (Tr. 163, 161) This large volume of

perishables is handled by a wholesale trade located in the City of New York and consisting of "some 200 wholesalers, jobbers, and brokers of fresh fruits and vegetables." (318 I.C.C. at page 472; J.S. 14a) The Commission found that the very substantial rate differences favoring the New Jersey municipalities as compared to New York City could well cause the removal of the wholesale trade from New York City to New Jersey. (321 I.C.C. at page 751; J.S. 48a) This wholesale trade, sometimes referred to in the Commission reports as the "wholesale market," is not one organization and is not an institution or a group over which the City of New York has any managerial or proprietary control. The wholesale trade consists of numerous individual merchants who are motivated by normal economic and business considerations and who could be induced to remove their businesses to those parts of the metropolitan area which the railroads choose to favor by lower freight rates.

The Commission reports and order. Following hearings on the complaint, the Commission's Hearing Examiner issued his report finding the rates unreasonable and unduly preferential and prejudicial as charged. Thereafter, Division 2 of the Commission, consisting of three Commissioners, by a vote of two to one, reversed the Examiner and dismissed the complaint. In its report Division 2 had disregarded the decision of this Court in *New York* v. *United States,* 331 U.S. 284, 308, 315, relating to undue prejudice and preference of regions and localities; and also the decision of this Court in *Baltimore & Ohio R. Co.* v. *United States,* 345 U.S. 146, 148-149, relating to the unreasonableness of freight rates. On reconsideration the Commission, by a vote of seven to four, observed and ap-

plied the cited decisions of this Court and found the rates complained of unreasonable in violation of Section 1(5) and unduly preferential of the New Jersey municipalities and unduly prejudicial to the City of New York in violation of Section 3(1) of the Act to the extent that higher rates were maintained to stations in New York City than to the New Jersey stations in the same terminal rate group.

By the Commission's order the railroads were directed "to cease and desist . . . from practicing the unlawfulness found" and to publish and maintain rates "which will prevent and avoid the undue prejudice and preference found in said report to exist." (J.S. 52a) No particular rate or rate level was fixed in the order or report. The Commission expressly stated in its report that "there is no apparent reason why the practice of rate equalization [within the terminal rate group] should be inconsistent with the revenue needs of the defendants;" and then explained how the equalization of the rates might be accomplished by raising rates rather than by lowering them. Furthermore, the Commission expressly indicated its approval of increased accessorial charges and additional accessorial charges for the "extraordinary" services and facilities provided at the Produce Terminal. (321 I.C.C. at page 750; J.S. 46a)

Opinion of the district court. Upon basis of a detailed analysis of the Commission's decision, the district court, in a unanimous decision, upheld the Commission's order. In the course of its opinion, it said:

> "Thus, the Commission had to resolve a conflict between the legitimate concern of the carriers, claiming urgent need to reduce losses, and the public interest in rate parity throughout the metro-

politan area. In these circumstances, the Commission properly considered whether the carriers' need for more revenue could be met by means other than breaking the rate group." (J.S. 5a-6a)

The district court concluded "that the Commission's order is adequately supported by a justified conclusion that unnecessary and undue preference and prejudice to geographic subdivisions of the New York metropolitan area is caused by the rate differential in controversy." The court found it unnecessary to consider the Commission's additional finding that the rates were unjust and unreasonable. (J.S. 8a)

ARGUMENT

This case presents no substantial question warranting plenary consideration by this Court.

The following opinions of this Court have firmly settled all pertinent principles of law:

Ayrshire Collieries Corp. v. *United States,* 335 U.S. 573; holding that the determination of proper rate groups "is a task peculiarly" for the Commission and not for judicial determination, that the Commission has "broad discretion" in the matter, and that the Commission is not bound by costs but may give consideration and weight to providing equality of competitive opportunity. (335 U.S. at pages 586-587, 590-591, 592, 593)

Illinois Commerce Commission v. *United States,* 292 U.S. 474; holding: "Treating an area as a unit and applying a uniform blanket or group rate within it, as is the common practice with respect to switching rates, is within the competence of the Commission." And, further, that the Commission is not controlled by costs. (292 U.S. at page 486)

Virginian R. Co. v. *United States,* 272 U.S. 658; holding that the Commission has power under both Section 1 and Section 3 to require the inclusion of excluded stations within a rate group despite the "depressed" level of the rates involved. (272 U.S. at pages 662, 665-666)

Baltimore & Ohio R. Co. v. *United States,* 345 U.S. 146; holding that despite the admission that the rates prescribed as "maximum reasonable" were below the cost of performing the transportation, the Commission had acted validly because: "The carload rates prescribed are but minor alterations in a vast, complex network of rates that apply to fresh vegetable shipments throughout the Nation. * * * The present rate order is but one of a long series of Commission orders designed to correct defects and injustices that develop from time to time in the general fresh vegetable rate pattern." (345 U.S. at pages 148-149)

New York v. *United States,* 331 U.S. 284; holding that an unjustified discrimination in rates against a region constitutes a "trade barrier" offensive to "the great purposes" of Section 3; that such rates "impede established industries" and "prevent the establishment of new ones;" and, accordingly, may be struck down even in the absence of any evidence that particular individual concerns suffer prejudice. (331 U.S. at pages 308, 315)

Appellants' argument as to similarity of transportation conditions. The principal argument and almost entire basis advanced by appellants in support of their appeal is that to sustain a finding of undue prejudice it must be shown "that transportation conditions to the point alleged to be preferred are substantially similar to those to the point alleged to be prejudiced." It is

said that the Commission did not make the necessary finding or have the required evidence to this effect. (J.S. 16-20)

This argument must be viewed as disingenuous in the extreme or, in the alternative, as advancing the discredited contention, repeatedly rejected by this Court, that any variation in costs in serving different stations within a rate group warrants a difference in rates.

The argument appears to be disingenuous as applied to the present case. The transportation under the rates involved ranged up to 2,035 miles from the Southwest and generally exceeds 1,000 miles from the South. (318 I.C.C. at pages 481-484; J.S. 26a-29a) The transportation service performed at origins in Texas and Florida is *identical* regardless of the station to which it is delivered in the New York terminal rate group. Similarly, on the long hauls of 2,000 miles from Texas and of over 1,000 miles from Florida, all but a minuscule fraction of the total transportation is not only obviously "substantially similar," it is *identical,* whether the freight is delivered in the New York terminal rate group at one of the New Jersey stations or at one of the stations in New York City. The only variation to be found is in the terminal services within the New York terminal rate group. And the only relevant variation in transportation service found by the Commission in defendants' evidence was represented by a cost difference of $14.14 per car which the Commission found to be not "controlling." (321 I.C.C. at pages 744-745; J.S. 38a)

Appellants' argument, when alternately viewed, amounts to a contention that the Commission may not require uniformity of rates within a rate group under Section 3 where *any* variation of costs is shown in

serving different stations. This argument is completely answered by the Commission's conclusions that, if accepted, it would lead to "a chaotic rate situation," "confusion and an impractical and unworkable rate structure," and would require "that the entire rate structure of the country would have to be remade." (321 I.C.C. at page 748; J.S. 43a) It is also directly answered by the decisions of this Court in *Ayrshire,* in *Illinois Commerce Commission, and in Virginian, supra.*

Burden of Proof. Appellants contend that complainants, and not the railroads, had the burden of showing the costs and transportation conditions involved in serving the 24 stations in New York City other than the Produce Terminal. (J.S. 14) Such information is peculiarly within the competence and control of the railroads and is not available to anyone other than the railroads. Accordingly, from the beginning it has been an established rule that the burden of proof in such matters is upon defendant railroads. See *H. McMorran and E. R. Harrington* v. *G. T. R. Co. Can.,* 3 I.C.C. 252, 261 (1889). A recent ruling to this effect is found in *Cudahy Packing Co.* v. *Akron, C. & Y. R. Co.,* 318 I.C.C. 229, 245-246. The latter case was appealed to the courts and the Commission's ruling as to burden of proof was specifically considered and expressly upheld. *A. T. & S. F. Ry. Co.* v. *United States,* 218 F. Supp. 359, at pages 374 (1963).

In the Commission proceeding, complainants made their *prima facie* showing when they presented, among other evidence, the abnormal and extraordinary disparity in charges for deliveries at different stations within the same metropolitan area and long-established terminal rate group. Defendants presented no justification for the higher charges to the 25 stations within

New York City, confining their defensive evidence to the costs of serving one station, the Produce Terminal, which admittedly is wholly unrepresentative and "extraordinary."

Truck competition. Appellants point to the fact that the rates involved were established to meet truck competition. (J.S. 18) But railroads may not publish reduced rates to meet truck competition for some shippers or receivers and not for others similarly situated, without violating Section 3. *Norcross Bros.* v. *Pennsylvania R. Co.,* 210 I.C.C. 629, 633; 220 I.C.C. 407, 411; *Petroleum and Petroleum Products,* 245 I.C.C. 33, 38; *National Water Carriers Assn.* v. *Long Island R. Co.,* 287 I.C.C. 726, 730. The Commission record is clear that the truck competition is "mainly to the New York part of the metropolitan area." (Tr. 80) The railroads did not deny or even question this fact.

The Commission's analysis of appellants' cost evidence. In a secondary argument (J.S. 20-22) appellants contend that the Commission acted "without evidence" in analyzing and separating into "ordinary" and "extraordinary" the cost figures presented by the railroads as to the services and facilities provided at the Produce Terminal.

This argument, like appellants' principal argument, is disingenuous. The Commission might have rejected, as did the Hearing Examiner (J.S. 37a), the railroads' cost showing on the ground that the figures presented failed to show the necessary separation or breakdown as between the costs of "ordinary" station services and the "extraordinary" accessorial services and facilities at the Produce Terminal. Instead of rejecting them as flawed and unacceptable, the Commis-

sion, in the interest of the railroads themselves, analyzed the faulty figures and, although hampered by the form of defendants' evidence, developed accessorial costs at the Produce Terminal which the Commission stated might well justify additional accessorial charges. By its analysis the Commission handed the railroads a notable victory by authorizing them to recover $36.82 of their costs at the Produce Terminal by new and special charges. (321 I.C.C. at pages 745, 750; J.S. 39a-40a, 46a) The Commission's analysis of the railroads' cost figures, of which appellants complain, relates solely to the "station" costs at the Produce Terminal. (231 I.C.C. at pages 745, 755-757; J.S. 39a, 53a-56a) Appellants' argument is not applicable to the "terminal" cost difference of $14.14. This difference was derived by a simple comparison of the "terminal" cost figures shown in the railroads' own cost evidence. (321 I.C.C. at page 743; J.S. 36a)

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

LEO A. LARKIN,
Corporation Counsel

SAMUEL MANDELL,
Assistant Corporation Counsel

Municipal Building
New York, N. Y.

Attorneys for The City of New York.

SIDNEY GOLDSTEIN,
General Counsel
F. A. MULHERN,
Attorney
111 Eighth Avenue
New York, N. Y. 10011

ARTHUR L. WINN, JR.,
SAMUEL H. MOERMAN
J. RAYMOND CLARK
JAMES M. HENDERSON
Investment Building
Washington, D. C. 20005
Attorneys for The Port of New York Authority.

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